

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO.
AMD-04-029

WILLIE MITCHELL,
SHELTON HARRIS,
SHELLY WAYNE MARTIN,
SHAWN GARDNER,

Defendants

VOLUME XXVII OF XXXVII
Friday, November 7, 2008
Baltimore, Maryland

Before: Honorable Andre M. Davis, Judge
And a Jury

Appearances:

On Behalf of the Government:
Robert Harding, Esquire
Michael Hanlon, Esquire
On Behalf of Defendant Mitchell:
Laura Kelsey Rhodes, Esquire
Michael E. Lawlor, Esquire
On Behalf of Defendant Harris:
Gerard P. Martin, Esquire
Paul Flannery, Esquire
On Behalf of Defendant Martin:
Thomas L. Crowe, Esquire
James G. Pyne, Esquire
On Behalf of Defendant Gardner:
Adam H. Kurland, Esquire
Barry Coburn, Esquire

Reported by:
Mary M. Zajac, RPR
Room 5515, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

1 (Proceedings at 9:47 a.m.)

2 THE COURT: Mr. Coburn, good morning.

3 MR. COBURN: Good morning to you, Your Honor. The
4 reason I just jumped up to the podium is to let the Court know
5 that Adam Kurland just let me know that he wasn't feeling well
6 and he's got, he's got a health history that might be relevant to
7 this. So I think Ms. Arrington might be calling the nurse.

8 THE COURT: Okay. Where is she now?

9 MR. COBURN: I think they're right outside.

10 THE COURT: Just sitting outside? Okay. Are there any
11 issues that we need to take up before we get started?

12 MR. COBURN: I have one.

13 THE COURT: All right, Mr. Coburn.

14 MR. COBURN: Your Honor, we had a little preview of the
15 excerpts of the court proceedings that the government has tapes
16 of that they intend to play during Agent Benson's testimony. And
17 it had been my understanding that, it had been my understanding
18 that the parts where Your Honor was talking were not going to be
19 included. But actually, in the excerpts at least that we were
20 hearing, there's a lot of the Court talking and a lot of Your
21 Honor reacting to what the defendants were doing, and at one
22 point has the Court saying something to the effect of, it's clear
23 the defendants are determined to be verbally disruptive and so
24 they're going to be excused.

25 I thought that was contrary to what Your Honor had

1 said. I just wanted to note my objection to that.

2 It's one thing for the government to play the
3 defendant's talking. It's another thing for them to play tapes
4 of the Court for whom, you know, there's sort of unquestioned
5 respect on the part of the jury, actually rendering an opinion on
6 the tape that the defendants --

7 THE COURT: Would you play the tape, please, Mr.
8 Harding?

9 MR. HARDING: Yes, Your Honor.

10 (Tape playing.)

11 THE COURT: Can you stop it for a moment, please?

12 My recollection is that the defendants made their
13 speeches in the order in which they were seated, and Mr. Martin
14 was seated next to Mr. Mitchell. But that sounds like Mr.
15 Gardner speaking now. Am I right?

16 MR. HARDING: Yes, Your Honor. The Court indicated
17 yesterday that I would have a limited amount of time with this so
18 I was going to stop when Mr. Mitchell got near the end of his.
19 Actually, I don't even include all of his speech.

20 THE COURT: I see.

21 MR. HARDING: And say, did Mr. Harris and Mr. Martin
22 give similar speeches? And then proceed to the next excerpt. I
23 have to do that, otherwise this will go on for a very long time,
24 Your Honor.

25 THE COURT: Sure. Okay.

1 MR. HARDING: I've made this to a little over ten
2 minutes, between 10 and 13 minutes.

3 THE COURT: And I appreciate that. So I'm right, then,
4 that you have basically edited out or skipped over the speeches
5 by Mr. Martin and Mr. Harris and you've gone to Mr. Gardner.

6 MR. HARDING: Yes. And of course we have the
7 transcripts. The agent is prepared to testify about anything,
8 either on direct or on cross examination.

9 THE COURT: Do you have complete transcripts of all the
10 speeches or just -- in other words, what transcripts do you have?

11 MR. HARDING: I have a transcript of most of what
12 happened that day, or all of what happened. We have transcripts
13 of all that was said in court that day.

14 THE COURT: Okay. Unredacted transcripts?

15 MR. HARDING: Unredacted, yes.

16 THE COURT: You did not intend to offer the
17 transcripts, however?

18 MR. HARDING: No, not if I can play the tape, Your
19 Honor. The point is to show how disruptive this was. And that's
20 why Your Honor is sometimes in these, too. It's important,
21 mostly the way in which this was disruptive was that the
22 defendants were interrupting the Court.

23 THE COURT: Right. Okay.

24 MR. HARDING: And it's impossible to convey how
25 disruptive this was unless Your Honor's voice is occasionally on,

1 periodically on this tape.

2 THE COURT: And I don't have a problem with that.
3 Exactly. I mean, what I've heard of my voice so far, I don't
4 have any problem with that. I just want, obviously, I wanted to
5 listen to what you intended to do. But Mr. Coburn has suggested
6 in his comments that there's more than just what we've heard so
7 far. And I'm sure there is more than what we've heard so far.
8 So we'll continue to listen.

9 Is my recollection correct that after Mr. Gardner gave
10 his speech, the Court attempted to, I don't know, have a colloquy
11 with either counsel or with the defendants, instructed them to
12 desist, and then they interrupted me two or three or four times?
13 Is that what we're getting to?

14 MR. HARDING: Just one moment, please.

15 THE COURT: Okay.

16 MR. COBURN: Your Honor, while they're -- can I just
17 take a peek out the door?

18 THE COURT: Sure.

19 MR. HARDING: All four defendants were together at
20 first. After the first three, Mitchell, Harris, and Martin, had
21 spoken, there was a break and there's a ten minute period where
22 Mr. Coburn is consulting with his client, Mr. Gardner. Then Mr.
23 Gardner, we, of course, aren't including any of that. And the
24 lawyers are on this almost hardly at all.

25 THE COURT: Right.

1 MR. HARDING: But Mr. Gardner then gives his speech.

2 THE COURT: Which, as I recall, unlike the other three,
3 Mr. Gardner, I think, was reading his.

4 MR. HARDING: Yes. He was reading, literally reading a
5 script. But at that point Your Honor cleared, there were more
6 disruptions. Your Honor asked the first three defendants, told
7 the marshals to remove the first three defendants, according to
8 what Agent Benson just told me. Mr. Gardner was here for a time.
9 You attempted to have a colloquy with him. You then ordered him
10 removed. And you had Mr. Mitchell and Mr. Harris brought back
11 into the courtroom -- Mr. Martin and, Mitchell and Martin brought
12 back into the courthouse and you attempted to have a colloquy
13 with them.

14 THE COURT: Okay. Go ahead. Continue playing it,
15 please.

16 (Tape playing.)

17 THE COURT: All right. Let's stop it right there.
18 Stop it right there, Mr. Harding. I think that that excerpt
19 gives you everything you need, together with the, with the
20 agent's testimony. And if you want the agent, I mean, if you
21 want to go into more of the transcript and have the agent read a
22 portion of the transcript, I think that's fine. But I think that
23 that -- what's that, about, five minute or so -- I think that
24 more than covers the field.

25 MR. HARDING: Well --

1 THE COURT: I mean, I don't know what else is after
2 that, but it's going to be more of the same. And I think the
3 point is well made in that excerpt.

4 MR. HARDING: Well, at the risk of arguing for, if we
5 could just play a few more minutes. If we could play three more
6 minutes, that's actually the most disruptive part, where they're
7 actually raising their voices.

8 THE COURT: Okay. Let me hear.

9 (Tape playing.)

10 THE COURT: Okay, let's stop it there. Let's stop it
11 there. Let's not have the jury hear me say, Have the marshals
12 remove anybody from the courtroom. I mean, you can have the
13 agent testify that that's what happened.

14 MR. HARDING: I can skip over that part when it comes
15 and move on. But the part that's, the part I really, there's
16 just a couple more minutes to this whole thing, Your Honor.

17 THE COURT: I think, I think that you've got it, Mr.
18 Harding. I understand there may be more delicious parts. But
19 let's just stay with what we've got there.

20 MR. HARDING: Okay.

21 THE COURT: All right. And are you able, do you have a
22 counter or something that you will know exactly when to --

23 MR. HARDING: Yes. There's a counter on this and I
24 just wrote down the number. Agent Benson was able, Your Honor,
25 to transfer this from a tape recording onto a CD so there's no,

1 there's no pause.

2 THE COURT: Great.

3 MR. HARDING: It plays a little slower than it actually
4 was in the courtroom and that's because of the original
5 reel-to-reel tape recording.

6 THE COURT: Right. Okay. All right. Thank you, Mr.
7 Harding. Yes, Ms. Rhodes.

8 MS. RHODES: Just a brief matter, Your Honor, related
9 to this. We move in limine that there be no mention of the
10 defendants not cooperating or not speaking to their lawyers
11 during any period of this representation.

12 THE COURT: That request is denied.

13 MS. RHODES: We think that that's an infringement of
14 their Fifth Amendment rights and Sixth Amendment right to
15 counsel.

16 THE COURT: So noted.

17 MR. COBURN: Could I just mention to Your Honor, as if
18 there there weren't enough sort of balls in the air right now. I
19 should probably just say for the record that just a few minutes
20 ago, just at the beginning of the colloquy, my co-counsel, Adam
21 Kurland, left the courtroom and he's being attended to outside of
22 the courtroom by medical personnel now. They're telling him that
23 he needs to go to the hospital. And the medic or the nurse out
24 there said that he, his service for today should be concluded.
25 Which creates an issue for me because, particularly because he's

1 supposed to do the closing in this case. And so if he misses
2 Agent Benson's testimony, it creates a difficulty.

3 THE COURT: Were you going to do the cross of Agent
4 Benson?

5 MR. COBURN: I was.

6 THE COURT: I will authorize expedited transcripts of
7 today's proceedings and I'll ask Ms. Zajac to get them to you and
8 Mr. Kurland just as soon as she can, over the weekend.

9 Obviously, we're nowhere near closing so I understand your point.

10 But before Monday's session, subject to Ms. Zajac being
11 a human being and having plans of her own, I will endeavor to
12 have Mr. Kurland, in his hands a full transcript of today's
13 proceedings, including this morning's proceedings.

14 MR. COBURN: Very kind of Your Honor to do it.

15 THE COURT: Of course, he may not be available on
16 Monday.

17 MR. COBURN: I know.

18 THE COURT: We can't be sure. And we'll have to abide
19 that event as things unfold. Have they summoned an ambulance?

20 MR. COBURN: I think that's what those sirens are.

21 THE COURT: We heard. Do you feel like you should go
22 with him? I really mean it, Mr. Coburn.

23 MR. COBURN: Well, he's a close, he's a really close
24 friend of mine and I got him into this case. So I feel like, I
25 mean, I'm just trying to figure it out in my own mind.

1 THE COURT: Think about it for a second and, really, if
2 you feel like you need to go with him --

3 MR. COBURN: I mean, the Court's here, the jury's here,
4 you know, everybody's here.

5 THE COURT: But it could be any one of us. It could be
6 any one of us.

7 MR. COBURN: Mr. Hanlon just kindly gave, is going to
8 give me a moment to think about it, with the Court's permission,
9 because he has an issue he wants to raise. Not Mr. Hanlon.

10 THE COURT: Mr. Lawlor.

11 MR. LAWLOR: That was the best compliment I got the
12 whole trial, someone calling me Mr. Hanlon.

13 Your Honor, it's quick, actually. I think in prior
14 proceedings, in fact I think it was Mr. Kurland who raised an
15 objection to the admission of any of this evidence.

16 THE COURT: Oh, the objection is noted.

17 MR. LAWLOR: I just wanted to make sure my memory was
18 right and that was preserved for all defendants.

19 THE COURT: It's absolutely preserved. There were
20 objections in one form or another to the fourth superseding
21 indictment's inclusion of this aspect of the alleged conspiracy.
22 And the objection to the admission of all of this evidence on
23 behalf of all the defendants is noted for the record and is
24 preserved.

25 MR. LAWLOR: Okay. Thank you. I appreciate that.

1 THE COURT: Mr. Coburn, I'm sorry. Apparently, the
2 ambulance is here. I'm told by Ms. Arrington that Mr. Kurland
3 doesn't want to go in the ambulance. But the marshals are
4 willing to transport him and my law clerk is willing to accompany
5 him to the hospital, if that figures into your decision at all.

6 MR. COBURN: It's really so kind of Your Honor to put
7 it to me that way.

8 THE COURT: But I absolutely leave it up to you.

9 MR. COBURN: I've just been polling all the other
10 lawyers here about this, trying to figure it out in my own mind.
11 I'd like to go but --

12 THE COURT: That's fine. Go.

13 MR. COBURN: Are you sure, Your Honor?

14 THE COURT: I'm absolutely sure. Go.

15 MR. COBURN: Very kind of you.

16 THE COURT: As soon as Ms. Arrington comes back, we'll
17 bring the jury in. Mr. Coburn, if you want to leave your
18 materials, I can assure you they'll be safe. And my law clerk
19 will collect them and they'll be either, we'll take them
20 upstairs.

21 MR. COBURN: Very kind of Your Honor. I'll do that and
22 be ready to go.

23 THE COURT: Bring the jury in. You think you have
24 another hour, Mr. Harding, with the agent, give or take?

25 MR. HARDING: Not quite. I don't think on direct I

1 have quite an hour with him.

2 THE COURT: Okay. So it's less than an hour.

3 MR. HARDING: But of course there's cross.

4 THE COURT: Of course. Of course.

5 (Mr. Coburn leaves.)

6 (Jury enters the courtroom.)

7 THE COURT: Members of the jury, good morning and thank
8 you for your patience. You will recall that I've told you many
9 weeks ago that we can't always predict events in an endeavor such
10 as a trial. And today is one of those instances in which no one
11 could have predicted this particular occurrence.

12 I'm afraid that Mr. Kurland, one of the attorneys for
13 Mr. Gardner, has taken ill this morning. We don't think it's
14 terribly serious. He's walking around and now on his way to the
15 hospital. But the health professional who checked him out this
16 morning made a decision that he really should go to the hospital
17 and get checked out more thoroughly. Under the circumstances, I
18 believe it's appropriate for us not to proceed today.

19 Mr. Coburn, in fact, is going to go with him to the
20 hospital. He is from the Washington area and has no family in
21 this particular area. And I think it's entirely appropriate that
22 Mr. Coburn accompany him to the hospital.

23 Again, we don't think it's terribly serious. We fully
24 expect him to be back with us on Monday. But under the
25 circumstances, we will not be able to proceed today.

1 Fortunately, this is a really, I think I can say,
2 relatively minor impediment to the good progress of the trial.
3 As you well know, we were pretty close to finishing the
4 government's case on yesterday, in which event we were going to
5 excuse you today so that I could spend some time with counsel
6 going over certain legal matters. But we didn't finish the
7 government's case yesterday. We were certainly going to finish
8 the government's case today, I think probably at the most another
9 two, perhaps two and a half hours with Detective Benson, who's
10 the last government witness, plus, as I mentioned, certain
11 housekeeping matters and clarifying certain exhibits and
12 presenting to you certain stipulations. Other than that, the
13 government's case is concluded.

14 So we will conclude the government's case early on
15 Monday. And then we'll have a recess and then we'll be prepared
16 to go into the defense case on Monday.

17 So despite the fact that we're not able to have the
18 half day session that we were hoping for today, I think we're
19 still making good progress.

20 I continue to believe that the case will not go into
21 December. It could. There is the possibility that that could
22 happen, and I will certainly apprise you as we go along, as my
23 beliefs mature, as it were. But I still think we're going to
24 finish the case before December.

25 In any event, any of you who have travel plans for

1 Thanksgiving and Thanksgiving weekend, I assure you we are not
2 going to disrupt your travel plans. So if it turns out that we
3 do need to go into December, we are not going to do anything
4 other than schedule the proceedings around your schedule.

5 I can tell you this with fair assurance. If the case
6 should go into December, I am quite confident that we will be in
7 the stage of the case where you will be in your deliberations.
8 So once you begin your deliberations, it's going to be entirely
9 up to you to decide how long you work on any given day, if you
10 want to stay late, if you want to break early, if you want to
11 take a long lunch. All of those decisions will be yours to make.

12 So I can assure you that the evidentiary portion of the
13 case will certainly conclude before Thanksgiving, barring any
14 unforeseen events. So you'll be the masters of your own fate if
15 we should find ourselves still in proceedings in December.

16 Obviously, no one can predict, no one would ever try to
17 predict, how long your deliberations may take. That's entirely
18 up to the way you go about it. Obviously, there's been many
19 weeks of testimony and lots of exhibits and you will want to take
20 your appropriate time to review all of that material, review your
21 notes, and fully discuss the case with each other.

22 So that's entirely up to you, how you go about that and
23 how long you want to spend on that. So we're not going to try to
24 predict that. But I can assure you that if the case is into
25 December, it will, the evidentiary portion will be concluded.

1 So with that, let me remind you to have no discussion
2 about the evidence or about any aspect of the case. Continue to
3 avoid any media reports about the case. Do not discuss the case
4 with any family or friends or associates. Conduct no
5 investigation of any sort whatsoever. Don't look up any words.
6 Don't go online. Don't visit any locations that have been
7 mentioned in the testimony. Continue absolutely to keep an open
8 mind about all issues in the case until after you have heard all
9 of the evidence, my instructions on the law, you've had the
10 benefit of counsel's closing arguments about the evidence, and
11 you've been told it's time for you to retire to begin your
12 deliberations.

13 Let me once again thank our alternates. You continue
14 to be very important to us and we appreciate your patience and
15 your commitment to the process every bit as much as we appreciate
16 our regular jurors.

17 So enjoy your weekend, ladies and gentlemen. It's
18 going to be 70 degrees today so take advantage. And we'll see
19 you on Monday at 9:30. Remember, no session on Tuesday of next
20 week. We'll be, we'll in holiday for Veterans Day on Tuesday.
21 So we'll see you Monday morning at 9:30. Enjoy your weekend,
22 ladies and gentlemen. Please leave your note pads on your
23 chairs.

24 (Jury exits the courtroom.)

25 THE COURT: Counsel, that last comment about December

1 arises from the fact that Belinda handed me a note from a juror
2 indicating that she has plans for Thanksgiving weekend and didn't
3 plan to come back until December 3rd, which would be Wednesday.
4 So we'll see how it goes. I would be willing, subject to hearing
5 from you, if that should eventuate, if the jury's still
6 deliberating when we break for Thanksgiving, frankly, I would be
7 willing to let the jury remain away until Thursday, December 4th.
8 Or I suppose the government could pay -- in her notes she
9 indicates she's willing to come back on Sunday if we will make it
10 possible for her not to incur any cost.

11 MR. HARDING: I'll pay out of my own pocket.

12 MR. MARTIN: I'll chip in, Your Honor.

13 THE COURT: Okay. We'll pass the hat.

14 MR. MARTIN: It might be the only thing Mr. Harding and
15 I ever agree on.

16 THE COURT: All right. We'll pass the hat and get the
17 juror's change fee taken care of.

18 All right. I'm sorry this has happened, counsel. But
19 I think, frankly, we've been very fortunate that we haven't had
20 any other kinds of delays. We're very close to the end. I don't
21 see why we can't close the government's case by late morning on
22 Monday. And I intend to give the jury a healthy lunch recess,
23 about two and a half to three hours, and hear some argument on
24 motions.

25 I thank Mr. Flannery for his motion. Mr. Coburn and

1 Mr. Kurland also filed Rule 29 motions and other counsel might
2 take advantage of this opportunity as well to file written
3 arguments so that we can be focused in our consideration of the
4 motions on what I expect will be late Monday, late Monday
5 morning, early Monday afternoon.

6 Ms. Rhodes, are you going to have any witnesses on
7 Monday? Or just on Wednesday?

8 MS. RHODES: I can have a couple on Monday.

9 THE COURT: Okay. So you'll have a couple here on
10 Monday?

11 MS. RHODES: Yeah.

12 THE COURT: Mr. Martin?

13 MS. RHODES: And I also have, Your Honor, a lot of,
14 some exhibits, certified documents. So that might take a little
15 bit of time.

16 THE COURT: All right.

17 MR. MARTIN: Your Honor, I have one for Wednesday.
18 Couldn't come any time but Wednesday.

19 THE COURT: Okay. Fairly short?

20 MR. MARTIN: Monday I may have, Mr. Lawlor and I,
21 almost called him Mr. Hanlon, Mr. Lawlor and I hope to have one
22 on Monday as well. We won't know until Saturday, though.

23 THE COURT: Okay. Fairly lengthy or fairly short?

24 MR. MARTIN: This one might be lengthy.

25 THE COURT: Lengthy? All right. Good. That seems to

1 take care of Monday.

2 MR. MARTIN: And we have documents and some other
3 things that we want to put in.

4 THE COURT: All right. Mr. Crowe, just generally?

5 MR. CROWE: Yes, Your Honor. I was going to say we
6 have certainly one for Monday, possibly two. But if other
7 counsel are going to use up Monday, we'll be happy to reschedule
8 it until Wednesday.

9 MS. RHODES: Your Honor, Mr. Crowe had mentioned that
10 to me. Mine are easier to move, I think, than his. So it's fine
11 if his are here, to go with that.

12 THE COURT: Okay. All right.

13 MR. CROWE: The only thing I can say is that they're, I
14 don't want to say there are problems with the witnesses, but it's
15 not the sort of control that I'm used to with witnesses. They
16 may not, you know, we'll hope, we hope they'll show up. We've
17 had problems.

18 THE COURT: Well, I would just say, get them here
19 whenever you can and we will do whatever's necessary to get them
20 on. If they're here, they're going to go on.

21 MR. CROWE: Thank you, Your Honor.

22 THE COURT: All right. Thank you very much, counsel.
23 Yes, Mr. Harding.

24 MR. HARDING: Just one point about Ms. Rhodes's
25 witness, Mr. Herb Lynch. She handed me a copy of the ex parte

1 submission yesterday at lunch time.

2 THE COURT: Yes. Can we clarify that now? Thank you
3 for reminding me, Mr. Harding. Go ahead.

4 MR. HARDING: The government is prepared to stipulate
5 to things like --

6 THE COURT: Rather than say "things like" I would
7 actually rather hear from Ms. Rhodes as to what her understanding
8 is of what you won't stipulate to.

9 MR. HARDING: Why don't we just have me say what I
10 won't stipulate to?

11 THE COURT: Because I need to hear from Ms. Rhodes why
12 she thinks that's important.

13 MR. HARDING: Okay.

14 MS. RHODES: Like he said. The concern I have, Mr.
15 Harding has said he can stipulate to things like the length.

16 THE COURT: I don't need to know what he stipulates to.
17 I need to know what he won't stipulate to and why you think
18 that's important.

19 MS. RHODES: What I think is important, and there are a
20 couple of things that have come up in light of some witnesses,
21 too. But generally, they're arguing that this conspiracy
22 continued for some period, including well before he went to
23 Hickey, or before he went to Hickey.

24 THE COURT: It's '94 through 2006.

25 MS. RHODES: Right. And he was at Hickey once briefly

1 in '94 early, I think it's 30 days or so, and then later, at the
2 end of '94, around November or December, for a year. So
3 certainly during the period of the conspiracy.

4 We think that, from their allegations, for example,
5 even looking at the fact that they have established that you can
6 have a cell phone at Supermax, it's important for us to establish
7 that Mr. Mitchell was not involved at all in the conspiracy
8 during that time he was there. And that would include things
9 like having to do with the rules of Hickey, that you're not
10 allowed to have cell phones, that you go through metal detectors.
11 That you have barb wired fences and things like that.

12 And to establish that Mr. Mitchell did not have access
13 to those things or was not using them, cell phones or even
14 regular phones, I think it's important for somebody to come in to
15 say what the daily schedule was like for people who were at
16 Hickey, including somebody like Mr. Mitchell who was on the
17 football team and was at practice or at games, and they had away
18 games, and how they were supervised tightly at the games and that
19 sort of thing.

20 So I don't think it's a matter that actually exists on
21 the record. And that's why I think it's important for Coach
22 Lynch to come here.

23 Now, additionally, there's been some, some testimony
24 implying other things about their behavior.

25 THE COURT: Okay. Let me take them one at a time. So

1 you are suggesting, I think, that Lynch is the only person in the
2 whole world who is reasonably available to you to come in to
3 testify that in the period between, let's say, '94 to '96, we had
4 rules, we enforced those rules, the young men were not allowed to
5 have cell phones, we did searches. And if you were involved in
6 an athletic program, you were at practice, etc. You're saying
7 that Mr. Lynch is the only person -- I mean, there's nobody at
8 Hickey now who was working there back in 94/96?

9 MS. RHODES: Well, I think part of the problem, as Your
10 Honor knows, is that Hickey has been significantly downsized.

11 THE COURT: Right.

12 MS. RHODES: It doesn't really exist in the format.

13 THE COURT: Right.

14 MS. RHODES: We had actually begun to collect this
15 evidence quite sometime ago as it related to mitigation.

16 So the people, I mean, we have spoken directly to the
17 superintendent there now, who has said, You can subpoena me but
18 I'm going to come in and say there are no records. We have
19 spoken to the Attorney General's Office who at one point had, in
20 response to some subpoenas, had given us what they had. There
21 apparently are these two, two printouts which the government and
22 we introduced yesterday, it's a government's piece of evidence,
23 indicating that that was sort of the pay, the pay times and
24 periods and the pay rate when he was employed there.

25 The other document we got from the Attorney General's

1 Office was a, about maybe 8 or 16 lines of a computerized thing
2 that indicated when he went to Hickey. It was more of a
3 Department of Juvenile Services printout.

4 We also had been able to subpoena directly from
5 Correctional Services Corporation or its successor, predecessor,
6 I forget which, the private, there were two private organizations
7 in Florida who were in charge of Hickey for a time. And we have
8 some records from them. But none of them have, none of them have
9 all of it together. None of them have anything close to all of
10 it together because even if we were to get somebody who were to
11 say what the rules were, and perhaps that person is out there
12 somewhere in the area, I don't know of them, we still wouldn't
13 have somebody to say, and I know where he was every afternoon and
14 I know what he was doing. And I think that's really critical to
15 our being able to establish that he was --

16 THE COURT: Well, first of all, you have not given me
17 an affidavit of Mr. Lynch, that that's what he's going to say.
18 It would be shocking -- I realize I didn't ask you for an
19 affidavit from Mr. Lynch. But I think you need to get one if you
20 really want to preserve your record, because you're proffering
21 that he's going to come in here and say that I knew where Willie
22 Mitchell was every day, every afternoon for the whole year he was
23 at Hickey, and that's inherently incredible.

24 MS. RHODES: I'm not going to say he's going to say for
25 every day, every afternoon.

1 THE COURT: What is he going to say? That's what I'm
2 trying to get at. It's about, it's about rules. It's about, he
3 had a lot of contact with Mr. Mitchell. This is not make
4 anything sense, Ms. Rhodes. I'm sorry. You can do this in any
5 number of ways and --

6 MS. RHODES: Your Honor asked me for a proffer and I
7 provided the proffer. If you want an affidavit, I'm happy to get
8 that.

9 THE COURT: Okay. So what I'm saying is if you get an
10 affidavit from Lynch as to what he would say, then I will
11 probably admit the affidavit. To whatever extent -- I'll hear
12 from the government, of course -- but if the government won't
13 stipulate to this, which, by the way, is of de minimis
14 importance. I mean, the fact that Mr. Mitchell was locked up at
15 Hickey for 11 months in 1994 has almost nothing to do with this
16 case. But that's your call. That's your call.

17 MS. RHODES: It is our call, Your Honor. It's our
18 defense.

19 THE COURT: All I'm saying is if you produce an
20 affidavit of what Lynch would say about that, okay, because we're
21 talking about what the government won't stipulate to. So if you
22 can give me an affidavit of what he would say if he were here,
23 one, the government might now stipulate if the government can
24 include in it what it would cover in its cross examination. And
25 by the way, Mr. Harding, have you actually spoken with Mr. Lynch

1 yet? Or have your agents?

2 MR. HARDING: No. In fact, I had a suggestion I was
3 going to make relevant to that, which is that instead of an
4 affidavit, Ms. Rhodes and I could have a conference call with Mr.
5 Lynch.

6 THE COURT: I thought I said that four weeks ago.

7 MS. RHODES: Your Honor, can I say something? I think
8 what's missing here is that our position is that we are entitled
9 to present a defense. And this defense in this situation
10 includes putting on the live witness of Coach Lynch. And --

11 THE COURT: And I've already told you you're not going
12 to be permitted to do that. If you had given me his name in voir
13 dire, Herbert Lynch, affiliated with Hickey School, we'd be in a
14 different world. Now, the other defendants want Juror Number
15 Nine in this trial. He's an African-American male. These
16 defendants don't want me to excuse that juror. You don't want me
17 to excuse that juror. But you didn't make it possible, with all
18 respect, for the judge in this case to conduct the careful voir
19 dire that would have been necessary.

20 If we had used the name "Herbert Lynch" in that jury
21 voir dire, I have reason to believe that that juror would have
22 stood up and said, I think I know Herbert Lynch. And it would
23 have come to light that this juror would not be permitted to
24 serve as a juror in this trial. He would have been excused.

25 If you had told me that, yes, you were going to call

1 Mr. Lynch and that juror had told me, as he later told us, that
2 Mr. Lynch was the trainer/coach for his 12-year-old son, that
3 juror would not be on this trial.

4 I don't mean this as unfair criticism, I really don't,
5 but the juror got on the jury because of Mr. Mitchell's failure
6 to talk to you, or for whatever reason. Coach Lynch doesn't tell
7 anybody about who anybody is. All right?

8 So this is where we are. Yes, you're entitled to put
9 on a defense, absolutely. And you're entitled to call any
10 witness, but not any witness who in the face of a juror who knows
11 the witness either has to be excused or the witness has to be
12 excluded. And nobody wants that juror excused.

13 So you want to have your cake and eat it, too. You
14 want the juror who knows Mr. Lynch, who has hired Mr. Lynch to
15 work with his son, to sit in judgment of someone who Mr. Lynch is
16 going to come in here and extol his virtues and his
17 determination. All right. So that's what the Court is dealing
18 with. So I'm trying to give you what you're entitled to. I
19 understand this is painful.

20 So I did suggest that you and Mr. Harding have a
21 telephone conference. You can probably work out a stipulation.
22 If he's going to come in and say Mr. Mitchell was on the football
23 team and he practiced every afternoon and Mr. Lynch never saw him
24 with a telephone or cell phone, I'm sure that Mr. Harding can ask
25 some questions that will level that out. So we make it all a

1 stipulation. That's all I'm trying to do, Ms. Rhodes. I'm not
2 trying to keep you from putting on a defense. It's the last
3 thing I want to do.

4 So please stop going back to you're entitled to call
5 Mr. Lynch. We're past that. So if you don't want my help, if
6 you don't want my input in trying to fashion a compromise, I'll
7 just stop. If that's what you want me to do, I'll stop. But you
8 said, Mr. Harding won't stipulate to this part of it. So I said,
9 So tell me why that's important. So why can't Mr. Harding
10 stipulate to that part of it?

11 MS. RHODES: Okay. Your Honor, I don't feel that I
12 have had an opportunity to put on the record our position and I
13 would like to do that now.

14 THE COURT: Go right ahead.

15 MS. RHODES: I apologize if it seems to be retreading
16 old --

17 THE COURT: Your position on what?

18 MS. RHODES: On the whole situation.

19 THE COURT: But you have.

20 MS. RHODES: I have not, Your Honor.

21 THE COURT: You have. What haven't you said? Go
22 ahead. Go ahead. Go ahead.

23 MS. RHODES: Thank you. Your Honor, Mr., the name
24 "Coach Lynch" was what was provided to the jury panel. And Coach
25 Lynch is known as Coach or Coach Lynch. If we had indicated his

1 middle name I'm not, I don't know that that would have meant
2 anything to the jurors.

3 THE COURT: His middle name?

4 MS. RHODES: Sorry. His name.

5 THE COURT: His name's not Coach, is it?

6 MS. RHODES: I apologize. No. Herb is his name. If
7 we had, if we had provided his first name, I am not sure that
8 would have made any difference to this witness because he is
9 known, he answers his voice mail, says, This is Coach. So it's
10 almost like a first name.

11 But that aside, I think that this witness, for whatever
12 reason, and I think if we indicated of Hickey School, I think it
13 certainly would have distracted the jury even more because he has
14 no idea, I think, that Coach Lynch ever worked at Hickey School.

15 Be that as it may, we are perfectly happy to have this
16 juror excused so that we can put on the live witness that we
17 think we are entitled to. Okay? That's number two.

18 So the fact that, and we know that there are still
19 alternates available. And I see, and it's too bad that others
20 would like to have this, this juror sitting. But the fact of the
21 matter is he wouldn't be on here if we had known this originally,
22 anyway. So it's not exactly, it's not exactly a, you know,
23 something that is a worse situation for them than if he had
24 disclosed this initially, if the juror had disclosed this
25 initially.

1 Now, so we get to, then, I think the tension between
2 my, my client's right to call a witness, to have the compulsory
3 process that is given him in the Constitution to call this
4 witness. To me, it doesn't seem like a very difficult call,
5 even. That it's, we want to have this witness and we can excuse
6 a juror and have an alternate take his place and I can call my
7 witness. That's why, I guess because fundamentally I don't
8 understand why there seems to be so much resistance to having
9 this witness testify live, that I keep going back to it.

10 But that's our position, that we are happy to, we are
11 happy to have this juror excused. That is fine with us.

12 THE COURT: Let me just say, and I'll let you finish,
13 it's clear if that juror had not been in the pool, it's clear to
14 me, that counsel would have exercised their peremptories in a
15 different way. There's no question about it. If that juror
16 hadn't been there, then whoever would have replaced that juror in
17 the jury pool, and some juror did, and I gave the defense extra
18 strikes, those strikes would have been exercised in a different
19 way potentially. So we can't, we can't recast that history.

20 It's not, to me it's not true to say if the juror had
21 been stricken for cause before counsel exercised their peremptory
22 strikes, the jury pool, the jury would have looked exactly the
23 same --

24 MS. RHODES: Very well.

25 THE COURT: -- as it did. That's my view.

1 MS. RHODES: Very well. At the same time, though, that
2 happens whenever anybody has been, has to be excused mid trial,
3 as it already happened with two other jurors. If we had known,
4 of course, that they were going to be stricken, we might have
5 done something different down the road. But I don't think that
6 that issue trumps Mr. Mitchell's right to, right to call a
7 witness.

8 THE COURT: Okay.

9 MS. RHODES: All right. So I will speak to Mr. Harding
10 and see what we can come up with.

11 THE COURT: I'm sorry?

12 MS. RHODES: Mr. Harding spoke to me. I was answering
13 him.

14 THE COURT: Okay. So you're going to have a conference
15 call?

16 MS. RHODES: Sure.

17 MR. HARDING: Yes. And just for clarification, Your
18 Honor, whatever affidavit or stipulation winds up being used in
19 this case, it seems to me evident that it shouldn't be an
20 affidavit of Herb Lynch.

21 THE COURT: No, of course not.

22 MR. HARDING: His name should not be mentioned at any
23 point in this.

24 THE COURT: Of course not. My point, my point was if a
25 testimonial affidavit could be prepared of what Mr. Lynch would

1 say on the stand and provided to the government, the government
2 could conduct in Mr. Harding's head a virtual cross examination.
3 So if he were to say what Ms. Rhodes has proffered, what would
4 you ask him? Questions such as, Well, Mr. Mitchell wasn't in
5 your sight 24 hours a day, right? Right. He had visitors,
6 didn't he? Probably. You had days off, didn't you? Yes. You
7 took vacation that year that Mr. Mitchell was at Hickey, right?
8 Yeah. So there was like a two week period when you weren't even
9 there, right?

10 So all I'm suggesting is that if we got that kind, if
11 we got Mr. Lynch's direct in the form of an affidavit, Mr.
12 Harding could look at that, quote-unquote, "direct testimony",
13 decide what questions he would ask on cross, and I would hope you
14 could do that in this conference call, and then a stipulation
15 could be put together in which all of the facts, the direct
16 facts, the cross examined facts, could be put in a stipulation,
17 not an affidavit of Coach Lynch.

18 No. His name wouldn't, wouldn't appear on it. It
19 would say something like, The parties hereby stipulate and agree
20 as to the following facts -- one, two, three, four, five, six,
21 through 27. The dates when Mr. Mitchell was there, what his
22 activities were, what the daily schedule was, what the rules
23 were, etc.

24 So I'm trying to give Mr. Mitchell everything that he
25 would have short of a real human being on the stand, and he gets

1 to keep the juror.

2 Now, Ms. Rhodes says they're happy to have the juror
3 excused. That's not my recollection. But maybe I misspoke, Ms.
4 Rhodes.

5 MS. RHODES: No, we had said that. I had said that
6 before.

7 THE COURT: I think you said both. I think, my
8 recollection, and it could be wrong, I have a very distinct
9 recollection during the trial when you indicated that you did
10 want to keep the juror.

11 MS. RHODES: We would, of course, prefer to.

12 THE COURT: Well, that's what I'm referring to, I
13 guess.

14 MS. RHODES: But if it's push comes to shove on this
15 issue, I would absolutely be happy to have the juror go.

16 THE COURT: Okay. That's your position. My
17 understanding was your position was a little different, that you
18 wanted both the juror --

19 MS. RHODES: That's why I wanted to clarify finally.
20 Because I did feel that it was not clear.

21 THE COURT: Okay. So if push came to shove, you would
22 prefer to excuse the juror. Now, part of the problem for me as I
23 sit here is, back when this first came up, you know, I said I'm
24 going to give you the weekend, or something like that, to decide
25 whether you want the juror. And my recollection is you came back

1 and said, We want the juror. Because I was prepared to excuse
2 the juror, if you recall very distinctly. I'm sure you do. What
3 I said was, I'm not going to leave the juror sitting there for
4 five weeks and then excuse the juror. That would be, I think
5 that's outrageous.

6 MS. RHODES: I believe that was the first colloquy we
7 had about it. Subsequently, you indicated you were going to sit
8 on it for a little while.

9 THE COURT: Okay. All right. That's fine. I think I
10 indicated I'm going to sit on it for a while but I think I was
11 very clear, though preliminarily clear, that we were not going to
12 have both the juror and Coach Lynch testify in this trial and
13 that I was not going to excuse the juror in the sixth week of the
14 trial. So if I was a little too fuzzy on that, then I apologize
15 to you. But I think I was reasonably clear that you were going
16 to have to make a decision. And I think the decision you
17 communicated to me, whether you intended to or not, was that you
18 preferred to keep the juror.

19 MS. RHODES: No, absolutely not. Absolutely not.

20 THE COURT: Because though Coach Lynch is not being
21 called a character witness, and we had this colloquy, you know,
22 when you cut right through to it, that's certainly what it's
23 beginning to look like, what it's always looked like. Anyway, go
24 ahead.

25 MS. RHODES: Well, Your Honor, I believe that I had

1 said when the issue came up about approximately the second time
2 that our decision was absolutely to get rid of the juror and to
3 call the witness. Because he's, in the context of this case,
4 Your Honor, the government has had I don't know how many weeks of
5 witnesses and testimony. We are going to have, on behalf of Mr.
6 Mitchell, with Coach Lynch, at the most, you know, six hours of
7 testimony. There's only one witness we have, possibly another,
8 but one witness that I know of right now who even knows Mr.
9 Mitchell. All the others are testifying about records or the rap
10 expert or some, you know, something else in his background.

11 So it is, in terms of our defense, it may seem like
12 it's a de minimis point in terms of, you know, this was some
13 slim, you know, some sliver of the conspiracy period. But when
14 it's all you have, it's that much more critical. And our
15 position is that with, that by losing the effect of a live
16 witness -- and part of it is the fact that this coach that he
17 knew is willing to come in, is willing to come in and sit in
18 front of the jury and let his demeanor and let his voice --

19 THE COURT: Don't have to be willing to come in. The
20 subpoena would command him to come in. He's not a volunteer.

21 MS. RHODES: All right. That he is here in front of
22 the jury, that he is, that they are able to evaluate his
23 demeanor, his truthfulness. I mean, that, that is something that
24 I believe Mr. Mitchell is entitled to at this point. And as de
25 minimis as it may be, it's not clear why the government, why the

1 government cares that much if it is such a small matter. I mean,
2 it's one witness against their, you know, 60 or whatever they've
3 had.

4 THE COURT: Okay.

5 MS. RHODES: It just seems like it's not letting Mr.
6 Mitchell play on a level field to deny him the one witness that
7 is probably the most important one we have.

8 THE COURT: Okay. I think that you indicated there
9 were two, or perhaps more, areas that the government wouldn't
10 stipulate to. What's the second?

11 MS. RHODES: Well, I think I kind of covered them.
12 Basically has to do with what, where he was and when he was, you
13 know, what his schedule was, and also the fact that he knows,
14 he's aware of his getting into college, of how that happened.
15 That is, it was something that was in terms of time, in terms of
16 there was a trip that he had made, he got permission to make with
17 Mr. Mitchell to visit the school, some things like that.

18 So it covers a slightly different period after Mr.
19 Mitchell was out of Hickey -- wait a second. Yes. He had
20 already left Hickey, I guess. But he went with him on the trip.
21 I'm not sure of the timing. But there was a trip that they took
22 out of state.

23 THE COURT: Okay. And you're saying the government
24 won't stipulate that Mr. Mitchell took a trip out of state to
25 visit colleges?

1 MS. RHODES: We didn't specifically discuss that one.
2 Mr. Harding's position, I thought, was it was very limited to
3 times of incarceration and dates and some --

4 THE COURT: I can't imagine the government won't
5 stipulate that Mr. Mitchell took a trip out of state to visit a
6 college in connection with winning a football scholarship. I
7 mean, that's obvious. He didn't show up at the college the first
8 time on the first day of football practice. He clearly visited
9 the college. I'm sure the government would stipulate to that.
10 Okay?

11 So I hope you can have a conference call perhaps over
12 the weekend and get this worked out.

13 MS. RHODES: Thank you, Your Honor.

14 THE COURT: All right. Thank you, Ms. Rhodes. Mr.
15 Martin?

16 MR. MARTIN: Your Honor, maybe I could just do this
17 from here.

18 THE COURT: Okay. Our position, at least my position
19 on behalf of Mr. Harris is that since the juror said, when you
20 asked him, that he could be fair, you could let her have her cake
21 and eat it, too. And I just want the Court to know that's our
22 position.

23 THE COURT: Okay. All right. I'd appreciate getting
24 any additional requests for instructions over the weekend and any
25 additional written arguments on motions.

1 And we will stand in recess until 9:30 on Monday
2 morning. Thank you.

3 MR. MARTIN: Thank you, Your Honor.

4 (Recess at 10:45 a.m.)
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REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of USA v. Willie Mitchell, et al., Case Number(s) AMD-04-029, on November 7, 2008.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this _____ day of _____, 2009.

Mary M. Zajac,
Official Court Reporter

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